

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MONTEREY MUSHROOMS, INC.,

Plaintiff,

v.

FEDERAL INSURANCE COMPANY,

Defendant.

Case No.18-cv-01439-BLF (VKD)

**ORDER DENYING WITHOUT
PREJUDICE STIPULATED
PROTECTIVE ORDER**

Re: Dkt. No. 26

On August 21, 2018, the parties filed a proposed Stipulated Protective Order, which was referred to the undersigned magistrate judge for review. Dkt. Nos. 26, 19.

Some of the provisions proposed to be included in the protective order appear to be inconsistent with the Civil Local Rules, guidelines, or other policies of this Court. Before entering the proposed protective order, the Court requires modifications to the proposed order and/or an explanation on the following points, before the order may be entered:

Section 5. The parties' proposed order omits Section 5.1, "Exercise of Restraint and Care in Designating Material for Protection," from this Court's Model Protective Order for Standard Litigation¹. The model provision prohibits mass, indiscriminate, or routinized designations of information and documents as "Confidential" or "Highly Confidential." The model provision is consistent with this Court's policy on filing documents under seal pursuant to Civil Local Rule 79-5, particularly those that have been designated as confidential or subject to a protective order under Local Rule 79-5(e). *See* Civ. L.R. 79-5(b) commentary ("As a public forum, the Court has a

¹ Available at <https://cand.uscourts.gov/model-protective-orders>.

1 policy of providing to the public full access to documents filed with the Court. . . . Proposed
2 protective orders, in which parties establish a procedure for designating and exchanging
3 confidential information, must incorporate the procedures set forth in this rule if, in the course of
4 proceedings in the case, a party proposes to submit sealable information to the Judge.”). The mere
5 designation of documents as “confidential” pursuant to a protective order alone does not support
6 sealing those documents. Civ. L.R. 79-5(d)(1)(A) (“Reference to a stipulation or protective order
7 that allows a party to designate certain documents as confidential is not sufficient to establish that
8 a document, or portions thereof, are sealable.”); *San Jose Mercury News v. United States Dist. Ct.*,
9 187 F.3d 1096, 1103 (9th Cir. 1999) (“It is well-established that the fruits of pretrial discovery are,
10 in the absence of a court order to the contrary, presumptively public.”). The Court encourages the
11 parties to include a provision, like the model provision, in their proposed protective order. If the
12 parties do not wish to include such a provision, they shall briefly explain the reason for omitting it.

13 **Section 8.** The parties’ proposed order does not include a “Section 8.” However, Section
14 10 includes a reference to “paragraphs 8 and 9 above.” Dkt. No. 26 at 5. If the parties intended to
15 include a Section 8, or if Section 10 contains an error, the parties should re-file a corrected
16 proposed order.

17 **Section 10.** The parties’ proposed order does not include the Court and its personnel
18 among those to whom the parties may disclose and provide copies of any materials designated as
19 “Confidential” or “Highly Confidential – Outside Counsel’s Eyes Only.” This omission should be
20 corrected, as the Court and its personnel should not be required to sign Exhibit A to the proposed
21 order in order to have access to material that is designated under the protective order. *See Model*
22 *Protective Order* at Section 7.2(d).

23 **Section 10.3.** The parties’ proposed order permits disclosure of materials designated as
24 “Confidential” or “Highly Confidential – Outside Counsel’s Eyes Only” to “any other persons
25 with prior authorization of the Court.” Dkt. No. 26 at 6. The Court does not expect to receive a
26 request for authorization every time the parties wish to disclose designated materials to persons
27 not already encompassed by the protective order; the parties may so agree without involving the
28 Court. If, however, the parties are unable to agree about whether a particular person should be

1 permitted to view designated protected material, then they may bring that dispute before the Court
2 following the procedure outlined in the undersigned's Standing Order re Civil Cases. The
3 proposed order should be modified accordingly.

4 **Section 12.** The parties' proposed order permits a non-party to "intervene in this Action to
5 enforce the provisions of this Protective Order as if they were a Party." *Id.* at 7. This provision
6 appears inconsistent with the preceding text of Section 12, which extends the benefits and
7 protections of the stipulated protective order to non-parties without requiring them to formally
8 intervene under Federal Rule of Civil Procedure 24. The parties shall either modify this Section
9 12 or provide a brief explanation for why they believe it is appropriate to require non-parties to
10 intervene to enforce provisions of the protective order.

11 **Section 14.** The parties' proposed order omits the Model Protective Order's Sections 12.1
12 and 12.2. The rights discussed in Sections 12.1 and 12.2 of the Model Protective Order apply
13 regardless of whether they are explicitly mentioned in a protective order. If, however, the parties
14 intend to waive those rights, they should so advise the Court.

15 For these reasons, the Court DENIES WITHOUT PREJUDICE the parties' stipulated
16 protective order. The parties may either submit a revised stipulated protective order that addresses
17 the matters noted above, or the parties may submit a joint discovery letter brief (in lieu of a
18 noticed motion) that explains why the proposed provisions are appropriate for the case and
19 consistent with the Court's rules, guidelines, and policies governing protective orders.

20 **IT IS SO ORDERED.**

21 Dated: August 30, 2018

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24 VIRGINIA K. DEMARCHI
25 United States Magistrate Judge
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